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No. 82-2032

In the Supreme Court of the United States

October Term, 1982

GABRIEL C. NEDECZKY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SECOND DISTRICT COURT OF APPEALS
GREENE COUNTY, OHIO

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

WILLIAM F. SCHENCK
Counsel of Record
Office of Greene County Prosecutor
Third Floor
Greene County Court House
Xenia, Ohio 45385
(513) 376-5250
Attorney for Respondent

WILLIAM D. BYER
Counsel of Record
840 Western Reserve Building
Cleveland, Ohio 44113
(216) 781-7777
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether a search warrant authorizing the search of premises known to have been the site of drug trafficking extends to a briefcase owned by a person who had been in the residence for four or five days prior to the search, when the objects of the search could be concealed within the briefcase.

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, State of Ohio, respectfully requests that this Honorable Court dismiss this petition for a writ of certiorari, or, in the alternative, deny issuance of the writ requested by the Petitioner.

OPINIONS BELOW

The opinions of the Common Pleas Court of Greene County, Ohio, the Second District Court of Appeals, Greene County, Ohio, and the Ohio Supreme Court are printed in the Appendices of the Petition filed by the Petitioner, Appendix "C," "B," and "A" respectively.

JURISDICTION

The Petitioner is claiming jurisdiction under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment IV:

"The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV, §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code

§2925.03(A)(6)

"No person shall knowingly do any of the following:
* * * * *
(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount; * * *"

§2925.11(A)

"No person shall knowingly obtain, possess, or use a controlled substance."

§2945.67

"A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to R.C. 2953.21 to 2953.24, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case."

§2953.02

"In a criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals * * *"

§2505.02

"An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without trial. * * *"

Ohio Criminal Rule of Procedure 12(J)

"The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certified that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

If the defendant has not previously been released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals."

STATEMENT OF THE CASE

On April 22, 1982, the Petitioner, Gabriel Nedeczky, was indicted on two counts of possession of controlled substances, violations of Ohio Revised Code Sections 2925.03(A)(6) and 2925.11(A).

After arraignment, the Petitioner moved for suppression of evidence which was to be used against him. A suppression hearing was conducted on June 17, 1982. On July 2, 1982, the court sustained the motion.

Because suppression of the evidence would render the State's case so weak that any reasonable possibility of prosecution would be destroyed, the State elected to appeal this case pursuant to Criminal Rule of Procedure 12(J) and Ohio Revised Code Section 2945.67. Notice of appeal was filed on July 8, 1982.

Following the filing of briefs and arguments, the Second District Court of Appeals reversed the trial court's decision to suppress the evidence. No plea was entered, nor was trial held.

Thereafter, the Petitioner requested leave to appeal, and the Supreme Court of Ohio declined to exercise its jurisdiction.

STATEMENT OF FACTS

On April 21, 1982, a search warrant was obtained for the search of the residence of Thomas Charles Hotop. The warrant authorized the search for and seizure of drugs, cash, and drug paraphernalia. (See Appendix D, Petition for Certiorari.)

Underlying the search warrant were the following facts, *inter alia*:

1. The affiant, Robert Clemmer of the Dayton Organized Crime Unit, had received information from a confidential, reliable informant who stated that Hotop was selling large quantities of hashish and cocaine at his residence;

2. The informant had seen a sale occur involving three white male subjects on April 16, 1982;

3. The informant had also purchased hashish from Hotop on April 16, 1982;

4. A second confidential, reliable informant had seen large quantities of blond hashish and white powder in baggies on April 20, 1982.

(See Appendix D, Petition for Certiorari.)

The search warrant was directed toward the seizure of drugs and evidence of drug trafficking. Because of a coordinated effort, the search was an authorized nighttime search.

Officers arrived at the Hotop residence to execute the search warrant. They knocked on the door, yelled that they were police officers and that they had a search warrant. Det. Robert Clemmer heard people running around inside, and he positioned himself at a window. (Supp. Hrg. at 20.) He saw two subjects, one of whom was the Petitioner, Gabriel Nedeczky.

Det. Clemmer testified that he saw the Petitioner run over to the sink and put his hands in the left side of the sink, take his hands out, wipe them on his pants, and walk to the door, which he opened. (Supp. Hrg. at 21.) On the other hand, the Petitioner denied having gone to

the sink. He stated he went to the door when the knocking started. (Supp. Hrg. at 10-12.)

When the sink was examined, water was trapped in the left side; there were approximately six plastic bags floating in the water. Dishes were also in the sink. (Supp. Hrg. at 21.)

The water was drained into some containers. (Supp. Hrg. at 21.) Testing revealed that the water contained cocaine. (Supp. Hrg. at 22.) Other cocaine was seized along with large sums of money.

In the rear bedroom of Hotop's residence, two briefcases were found. One was opened by Det. Clemmer, and it revealed large sums of money; the other was found in the closet. Det. Modesitt took that briefcase to another room because it was locked. (Supp. Hrg. at 24.) Det. Modesitt carried the briefcase to Hotop and asked him if it was his. Modesitt was informed that the briefcase belonged to the Petitioner. According to the Defendant's testimony, the briefcase did belong to him. He had been staying in the house for four or five days. (Supp. Hrg. at 7.)

The accounts of the Petitioner and the officers differ as to what was stated to the Petitioner, but it appears that the Petitioner refused consent and the briefcase was forced open. Inside the briefcase were drugs: methaqualone and cocaine. (Supp. Hrg. at 29.)

The trial court ruled that there was no consent for the search and that no exigent circumstances existed. (See Appendix C, Petition for Certiorari.) After so doing, the court suppressed the evidence. The Second District Court of Appeals reversed the order suppressing the evidence.

The Petitioner applied for leave to appeal to the Ohio Supreme Court, and leave was denied.

REASONS FOR DENYING WRIT

I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS APPEAL IS PREMATURE AND NOT RIPE FOR ADJUDICATION.

The sole issue which is being raised by the Petitioner is that certain evidence which was seized during the execution of a search warrant should be suppressed. However, there has been no conviction in this case.

Procedurally, the case has followed this course: the trial court suppressed the evidence being contested; the Respondent appealed the ruling on the suppression; a reversal was obtained from the Second District Court of Appeals; upon remand, the Petitioner was granted a continuance and filed a motion for leave to appeal in the Supreme Court of Ohio. Leave to appeal was denied by the Ohio Supreme Court, and a petition for certiorari was filed in this Court.

Section 2953.02 of the Ohio Revised Code provides that a judgment or final order of a court of record may be reviewed in the court of appeals. However, it is apparent that there has been no final judgment here. Equally apparent is the fact that the order entered by the appellate court, which in essence overruled the motion for suppression filed in the case below, is not the type of final order from which an appeal lies. Section 2505.02 of the Ohio Revised Code defines a final order and reads, in part: "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment . . . is a final order . . ."

In Ohio, the Supreme Court has examined the requirements for criminal appeals. In *State v. Chamberlain*, 177

Ohio St. 104 (1964), the Court was deciding whether an order of the trial court overruling the defendant's motion to withdraw his guilty plea was an appealable order or final judgment from which the defendant could appeal. Turning to the case of *Berman v. United States,* 302 U.S. 211 (1937), Chief Justice Hughes stated: "Final judgment in a criminal case means sentence. The sentence is the judgment." *Id.* at 212. Further discussing the matter, the Supreme Court of Ohio stated: "From the foregoing cases, it appears that in a criminal case there must be a sentence which constitutes a judgment or a final order which amounts 'to a disposition of the cause' before there is a basis for appeal." 177 Ohio St. at 107.

It is submitted that this case has been brought to this Court prematurely. It has been held in one reported decision of an appellate court in Ohio that the overruling of a motion to suppress is not a final appealable order. *State v. Wetzel,* 118 Ohio App. 368 (Franklin Cty. 1963). The State contends this is the proper view. Unless an order falls within the statutory limitations of Revised Code Section 2505.02, there is no right to appeal. See *Hoffman v. Knollwood,* 135 Ohio St. 170 (1939); *State v. Roberts,* 106 Ohio App. 30 (Clark Cty. 1957). The fact that the order overruling the motion to suppress was entered by the court of appeals rather than the trial court should not convert the denial into an appealable order.

It would be difficult to find a case in which the judgment was more certain than in the case of *State v. Chamberlain, supra.* In that case, the defendant had previously pled guilty and subsequently made a motion to withdraw his guilty plea. The *Chamberlain* court stated:

> The order here, the overruling of defendant's motion, did not prevent a judgment but in effect made possible the entering of judgment. Thus, the overruling of the

> motion was merely interlocutory in nature and did not amount "to a disposition of the cause."

177 Ohio St. at 107.

In a case such as the case at bar, the petitioner is in the same position now as he would have been if the trial court had overruled his motion to suppress in the first instance. He has not been convicted, and it is conceivable that he would not be convicted. Therefore, this case has been brought to the Supreme Court prematurely and should be dismissed.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW PROPERLY INTERPRETED AND APPLIED THE CASES PREVIOUSLY DECIDED BY THIS COURT.

Starting with the proposition that a search warrant for premises authorizes a search of containers which could conceal the object(s) of the search and which are found within the premises, the State submits that the search of the briefcase in the case at bar was permissible, and did not violate the Fourth and Fourteenth Amendments to the United States Constitution.

A recently issued decision by this Court defined the scope of a search of premises. *United States v. Ross,* ..... U.S. ....., 102 S. Ct. 2157 (1982). Although dealing with car searches, the Court compared the search of containers found within a vehicle after probable cause arises to searches of containers found on premises:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that au-

thorizes an officer to search a home for illegal weapons also provides adequate authority to open closets, chests, drawers, and containers in which the weapon might be found.

In the instant case, the officers had a warrant authorizing the search of Thomas Hotop's residence for cocaine, marijuana, cash, receipts, and drug paraphernalia. It seems eminently reasonable, based upon the Supreme Court's rationale in *Ross*, to believe that a briefcase falls within the scope of this search warrant. While the Court in *Ross* did not decide the specific question presented in this case, the opinion did speak to the issue of the search of closed containers pursuant to a legally authorized search. Other federal and state courts have addressed the specific question presented here, although the State of Ohio has no reported decisions regarding this issue. *United States v. Gentry*, 642 F.2d 358 (10th Cir. 1981); *United States v. DeSimone*, 660 F.2d 532 (5th Cir. 1981), *cert. denied*, ... U.S. ....., 102 S. Ct. 1732 (1981); *United States v. Kralik*, 611 F.2d 343 (10th Cir. 1979), *cert. denied*, 445 U.S. 953; *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973); *State v. Davenport*, 516 P.2d 65 (Haw. 1973); *United States v. Teller*, 397 F.2d 494 (7th Cir. 1968), *cert. denied*, 393 U.S. 937 (1968); *Walker v. United States*, 327 F.2d 597 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 956 (1964); *State v. Nabarro*, 525 P.2d 573 (Haw. 1974); *Commonwealth v. Platou*, 312 A.2d 29 (Pa. 1973); *United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973); *Commonwealth v. Homsher*, 427 A.2d 760 (Pa. Super. 1981); *United States v. Branch*, 545 F.2d 177 (D.C. Cir. 1976); *United States v. Neet*, 504 F. Supp. 1220 (D. Col. 1981).

The case upon which the Petitioner relies heavily is easily distinguishable on its facts. In *Ybarra v. Illinois*, 444 U.S. 85 (1979), there was no allegation in the affidavit

of drug trafficking. The search warrant authorized search for evidence of possession and other evidence of preparation for sale. The facts differ from the case at bar: the affidavit indicates that Hotop was using his residence as a place for sale of drugs and that two separate sales had occurred on the premises within four days. The Petitioner's automobile had been observed at the residence at the time of the drug trafficking. Furthermore, the briefcase was located in the vicinity of another briefcase which contained large sums of money. More importantly, however, is the fact that *Ybarra* involved the search of a person, and not of a container located elsewhere on the premises. Likewise, in *United States v. DiRe,* 332 U.S. 581 (1948), the Court was concerned with the personal search of the occupants of a car. Search of the briefcase in the case at bar was logical and fell within the scope of the warrant.

The Court of Appeals of Greene County did not hold, as is contended by the Petitioner, that *Ross* controls in all cases involving the search of containers. The decision of the appellate court is limited to the facts of this case. The court found that Nedeczky had more than a casual visitor status to the premises. That, coupled with the fact that the search warrant authorized search for drugs and other evidence of drug trafficking which could logically be concealed within the briefcase, was the basis of finding that the search warrant authorized the search of the Petitioner's briefcase. The court did not hold, however, that persons could be searched.

Respondent is not urging this Court to find that the *Ross* decision implicitly overrules *Ybarra,* as the Petitioner has stated. Both decisions are valid and deal with different issues. The State submits that even though the officers knew, or had been informed, of the ownership of

the briefcase, under the facts of this case they were not under an additional duty to obtain another search warrant before they could open the briefcase. Given the underlying facts in the affidavit and the activity surrounding the execution of the warrant, the Respondent contends that the scope of the warrant covered any containers in the residence which could logically contain drugs or other items specified in the warrant.

Ironically, if the Respondent were to be required to obtain an additional search warrant in this case, the affidavit would be substantially the same, with the addition of allegations as to the Petitioner's briefcase. The Respondent submits that if such a requirement were imposed, the result would approach the idea that a warrant must be obtained for any container within a container. See *United States v. Morris,* 647 F.2d 573 (5th Cir. 1981); *United States v. DeSimone, supra; United States v. Combs,* 468 F.2d 1390 (6th Cir. 1972), *cert. denied,* 411 U.S. 948 (1972).

If the Petitioner's interpretation were applied, a problem would arise in that the Respondent would have to rely upon the word of a person on the premises as to ownership of containers. It would be possible for the target of a search warrant to completely circumvent the warrant by claiming that an item on the premises did not belong to him, but belonged to someone else on the premises at the time. To protect itself from suppression of that evidence, the State would be forced to acquire additional warrants or risk having evidence thrown out prior to trial.

Under the circumstances in this case, the Respondent submits that the search of the Petitioner's briefcase was permissible because the search warrant for the search of Hotop's residence included the briefcase within its

scope. The Second District Court of Appeals, Greene County, Ohio, correctly ruled that suppression of the evidence contained within the Petitioner's briefcase was error.

CONCLUSION

It is respectfully requested that this Honorable Court dismiss the Petition for Writ of Certiorari filed in this case, or in the alternative deny issuance of a writ of certiorari. It is submitted that this Petition is premature because the Petitioner has not been convicted of any crime, nor has there been a final judgment or final appealable order in this case. Additionally, the Respondent contends that the interpretation of Constitutional Amendments IV and XIV were correctly considered by the Greene County Court of Appeals, and that the constitutional principles delineated in this Court's prior decisions were followed.

Respectfully submitted,

WILLIAM F. SCHENCK
Counsel of Record
Third Floor
Greene County Court House
Xenia, Ohio 45385
(513) 376-5250
Attorney for Respondent